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Supreme Court of the United States

OCTOBER TERM, 1963.

No. [redacted] 61

RADIO AND TELEVISION BROADCAST TECHNICIANS LOCAL UNION 1264, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, ET AL.,

Petitioners,

versus

BROADCAST SERVICE OF MOBILE, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama.

MOTION FOR PERMISSION TO FILE REPLY BRIEF TO THE MEMORANDUM OF THE UNITED STATES AS AMICUS CURIAE.

BRIEF OF RESPONDENT IN REPLY TO THE MEMORANDUM OF THE UNITED STATES AS AMICUS CURIAE.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No. 1006.

RADIO AND TELEVISION BROADCAST TECHNICIANS LOCAL UNION 1264, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, ET AL.,

Petitioners,

versus

BROADCAST SERVICE OF MOBILE, INC.,

Respondent.

MOTION FOR PERMISSION TO FILE REPLY BRIEF TO THE MEMORANDUM OF THE UNITED STATES AS AMICUS CURIAE.

Comes Broadcast Service of Mobile, Inc., Respondent herein, and moves the Court to file the attached *Brief of Respondent To The Memorandum Of The United States As Amicus Curiae* and as grounds therefor shows:

1. This cause is before the Court on a Petition for a Writ of Certiorari to the Supreme Court of Alabama.

2. The Solicitor General of the United States has filed a brief in this cause on the merits of the issues raised in the Petition for a Writ of Certiorari.

3. Respondent has not had an opportunity to be heard in this Court on arguments advanced by the Solicitor General.

Wherefore, Respondent requests permission to submit the accompanying brief.

Dated at Mobile, Alabama, this 11th day of September, 1964.

Respectfully submitted,

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OCTOBER TERM, 1963.

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RADIO AND TELEVISION BROADCAST TECHNICIANS LOCAL UNION 1264, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, ET AL.,

Petitioners,

versus

BROADCAST SERVICE OF MOBILE, INC.,

Respondent.

BRIEF OF RESPONDENT IN REPLY TO THE MEMORANDUM OF THE UNITED STATES AS AMICUS CURIAE.

The United States contends that, upon the undisputed facts of this cause, the National Labor Relations Board would conclude that the five separate corporations of the Holt Broadcasting Service would constitute a single employer for purposes of the Board's discretionary jurisdictional rules. The Alabama Supreme Court did not make any findings of fact or conclusions of law on this contention; doubtless because, under its views of the applicable law, this contention was immaterial.

The Solicitor General asks this Court to review the evidence pertaining to the corporate structure, ownership and modus operandi of each of the five corporations, and then determine in the first instance whether the Board would consider the five separate corporations as a single employer for jurisdictional purposes. It is not the function of this Court to make an independent examination of this entire record and to pass on the evidence without its prior consideration by the lower court. *National Labor Relations Board v. Donnelly Garment Co.*, 330 U.S. 219, 237, 91 L. Ed. 854, 867-8. Nor is it the function of this Court to apply Board decisions to the facts of this cause in the first instance. *National Labor Relations Board v. Pittsburgh Steamship Company*, 337 U.S. 656, 661, 93 L. Ed. 1602, 1607. If this Court should determine that the Supreme Court of Alabama erred in refusing to look to the operations of the several separate corporations, this Court should remand this cause to the Supreme Court of Alabama with directions to apply the appropriate law to the facts.

Assuming, arguendo, that the Supreme Court of Alabama erred in failing to consider whether the separate corporations should have been considered together for jurisdictional purposes, the applicable Board and Court decisions clearly establish that WSIM is a single employer for jurisdictional purposes.

The Board has on occasion treated separate concerns which are closely related as being a single employer for the purpose of determining whether the Board would assert jurisdiction.

According to the *Twenty-First Annual Report of the National Labor Relations Board*, at Pages 14-15:

> The question in such cases is whether the enterprises are sufficiently integrated to consider the business of both together in applying the jurisdictional standards.
>
> The principal factors which the Board weighs in deciding whether sufficient integration exists include the extent of:
>
> 1. Interrelation of operations;
> 2. Centralized control of labor relations;
> 3. Common management; and
> 4. Common ownership or financial control.

1. Interrelation of Operations.

Interrelation of operations consists of one enterprise performing a service for, or making sales to, an affiliated company. *Venus Die Engineering Company*, 110 NLRB 336. Here, each operating corporation operates a radio station in a city widely separated from any of the other radio stations (R 324-5); none of the operating corporations renders any service to or make any sales to any of the other corporations. The only evidence, if any, of integration of operations is that a separate service corporation performs some of each operating corporation's bookkeeping (R 328, 338). The Board and the courts have consistently held that centralized book-

keeping does not constitute "interrelation of operations". *Bachman Machine Company v. National Labor Relations Board*, 1959, 8 Cir., 266 F.2d 599, 601, 605; *Clark Concrete Construction Corporation*, 116 NLRB 321, 322; *Modern Linen & Laundry Service, Inc.*, 110 NLRB 1305, 1306; *Spartan Cafeteria Corporation*, 109 NLRB 166, 167.

2. Centralized Control of Labor Relations.

"Labor Relations" as used by the Board means wage rates, vacations, and other employee benefits. In *Central Dairy Products Co.*, 114 NLRB 1189, Central Dairy Products was "managed by the Southwest Management Company" which "was created for the sole purpose of administering" Central Dairy Products and two other companies engaged in a similar line of business. Corporate officers of Central Dairy Products, Southwest Management Company, and the two affiliated companies were identical. The Board concluded that each corporation was a separate enterprise for jurisdictional purposes. In so finding, the Board at 114 NLRB 1189, 1190, relied on the following:

> The record is devoid of evidence which would show centralized control of labor relations among these corporations with respect to the hiring and discharging of employees, setting wage rates, and establishment of vacations and other employment benefits. Similarly there is no indication of interchange of employees among the corporations. Under these circumstances, the facts that the 4 corporations have the same officers and that 3 of the corporations are managed by a fourth are not sufficient evidence to establish that the 4 corpora-

tions constitute a single employer within the meaning of the Act or that the Employer is a part of a single integrated enterprise.

Here, WSIM's station manager and the station manager of each of the other corporations have full charge of labor relations as defined by the Board; each station manager determines his employees' rates of pay, hours of work, vacations, holidays, and other working conditions; each station manager has and exercises the unfettered authority over hiring and discharging employees (R 144, 197, 296, 305, 327, 328, 339).

WSIM's manager's seeking help from another corporate officer when the union made legal contentions about the existence of a contract and the status of an alleged employee does not show "centralized control of labor relations".

Indeed, even if a single officer controlled the labor relations of all four operating stations in connection with negotiations with unions, such fact would be insufficient to justify considering the business of the other three stations in applying jurisdictional standards. *Bachman Machine Company v. National Labor Relations Board*, 1959, 8 Cir., 266 F.2d 599, 605.

3. Common Management.

The record conclusively shows that WSIM is managed by its station manager. The manager hires and discharges the employees, sets their hours of work, determines the program content, and is in full charge of the

day-to-day operations (R 110, 118, 130, 131, 144, 157, 197, 296, 297, 304, 305, 327, 328, 329).

Moreover, the Board has frequently refused to combine the receipts of two corporations for jurisdictional purposes even where both were under the same immediate management. In *Toledo Service Parking Company*, 96 NLRB 263, 264, the Board held that several corporations which operated parking garages under the supervision of one general manager were separate and distinct for jurisdictional purposes in spite of:

> . . . the record facts showing that the controlling stockholders of the Employer are also controlling stockholders of various other corporations, engaged in business operations similar to that of the Employer in many different States, and that there are certain individuals who are common to the directorate of all such corporations. There is one general manager employed by all the corporations engaged in the business of rendering parking services.

The Board concluded:

> We do not believe, however, that such facts establish an integration of these various corporations of such a character that we should regard them, for jurisdictional purposes, as one integrated operation.

4. Common Ownership and Financial Control.

Common ownership and financial control is the least significant of the factors which the Board considers in

determining whether two or more corporations are a single employer for jurisdictional purposes. The Board and Court decisions turn on the exercise of the power to control the "day-to-day operations" of the corporation rather than the naked power to control. *Goodman's, Inc.*, 101 NLRB 352, 353. In *Miami Newspaper Pressmen's Local No. 46 v. National Labor Relations Board*, 1963, D.C. Cir., 322 F.2d 405, 408, the Court held that:

> . . . both the Board and the courts have consistently and repeatedly held that common ownership alone does not suffice for this purpose. There must be something more in the form of common control, as it is usually phrased, denoting an actual, as distinct from merely a potential, integration of operations and management policies.

The First, Fifth and Eighth Circuits have held that the power to control the "day-to-day operations" of related corporations is irrelevant; that only the exercise of the power to control the "day-to-day operations" of separate corporations may be considered in determining whether separate corporations are to be considered as a "single employer" under the National Labor Relations Act: *J. G. Roy & Sons Co. v. National Labor Relations Board*, 1958, 1 Cir., 251 F.2d 771, 773-4; *Employing Lithographers of Greater Miami v. National Labor Relations Board*, 1962, 5 Cir., 301 F.2d 20, 28-9; *Bachman Machine Company v. National Labor Relations Board*, 1959, 8 Cir., 266 F.2d 599, 605.

Here, each corporation operates a radio station in a city far removed from the stations of each of the other corporations (R 323-6, 347). Each corporation has its

own manager who operates his corporation's radio station (R 110, 118, 130, 131, 144, 157, 296, 297, 304, 327). Each manager selects and discharges his own personnel (R 144, 197, 296, 305, 327, 328, 339). Each manager sets the wages of his personnel (R 144, 296, 328), and determines when his employees will have a vacation or a day off (R 296). Wages are not uniform among the several corporations (R 328). Each corporation maintains its own separate set of books in the city where it operates its radio station (R 115, 116, 327). Each corporation maintains a separate payroll (R 327), files separate federal income and social security tax returns (R 326, 327), and each files separate reports with the Federal Communications Commission (R 326). Each corporation's funds are kept separately (R 326). Each corporation has a bank account in the city where it operates its radio station, and each corporation also has a separate account in Hattiesburg, Mississippi (R 326). Each station manager makes his own purchases and approves his own bills for payment (R 327). Some of the stations have national advertising representatives and some have none (R 339). All advertising sold by WSIM was sold in and about Prichard, Alabama (R 346). There has been no national advertising over WSIM (R 346). One of the stations operated by the separate corporations is an affiliate of the American Broadcasting Company; one is an affiliate of the National Broadcasting Company; and two have no affiliation (R 346). Holt and Lightsey visit various stations periodically (R 328). They visit some stations more than others (R 328).

Each station manager has complete responsibility for the "day-to-day operation" of his station (R 304, 305, 327).

The undisputed testimony outlined above establishes that the station manager has full charge of, and responsibility for, the important "day-to-day operation" of his station.

The Board frequently refuses to consider the business of a parent corporation in determining whether the Board will exercise jurisdiction over a wholly owned subsidiary. *Consolidated Gas Company*, 107 NLRB 148, *Goodman's, Inc.*, 101 NLRB 352, *Spartan Cafeteria Corporation*, 109 NLRB 166, *Butte Water Company*, 117 NLRB 484. These parent-subsidiary cases best demonstrate the distinction between the power to control and the exercise of control over the "day-to-day operations" of separate corporations.

If this Court determines to decide the factual issues presented here, the Court should at least weigh the evidentiary facts relied upon by the Board in decided cases in order to properly apply the four criteria of the Board.

Sakrete of Northern California, Inc., 137 NLRB 1220, affirmed, *Sakrete of Northern California, Inc. v. National Labor Relations Board*, 1964, 9 Cir. 332 F.2d 902 and *Perfect T.V., Inc.*, 134 NLRB 575, cited by the United States are inapposite. In *Perfect T.V., Inc.*, the employer admitted that the various corporations have "a

very, very close interrelated working arrangement, and, in fact, are managed and operated by the same personnel"; in *Perfect T.V., Inc.*, the Board did not make any detailed findings that would help this Court ascertain what evidentiary facts the Board relied upon in reaching its conclusion. In *Sakrete of Northern California, Inc.*, the Court of Appeals and the Board specifically relied upon the fact that one Avril, who was President of both corporations, did substantially "more than set general policy"; Avril exercised authority on "local matters" such as the hiring and firing of employees, setting wage rates and conditions of employment. Here, the local manager has unfettered authority over all of the local matters controlled by Avril in *Sakrete* as well as other local matters (R 110, 118, 130, 131, 144, 157, 197, 296, 297, 304, 305, 327, 328, 329).

The United States contends that during a short period of time, the Board required, in addition to the four enumerated elements, that there be some interchange of employees between the corporations and some uniformity in their labor conditions; however, the United States does not cite any case to support this contention, and we have been unable to find any such case. In *Perfect T.V., Inc.*, 134 NLRB 575, cited by the United States, the Board specifically relied upon the fact that both corporations were "operated by the same personnel". In *Hartford Building Maintenance Co.*, 1964, 145 NLRB No. 140, 55 LRRM 1173, 1174, the Board, in determining that it would combine the business of two corporations, specifically relied upon the "interchange of employees". In *Thunderbird Hotel, Inc.*, 1963, 144

NLRB No. 19, 54 LRRM 1014, the Board relied upon two corporations sharing the same employees, in finding that two corporations were a single employer for jurisdictional purposes. Uniformity in labor conditions and interchange of employees are, and always have been, salient criteria employed by the Board in determining whether two corporations are a single employer.

Due to the Board's laudable policy of disposing of cases on an informal basis, few cases reach the decision stage in which the Board has not exercised jurisdiction. An evaluation of the evidentiary facts upon which the ultimate facts are based in Board decisions is necessary to a proper understanding of the Board's criteria.

The Board declined to assert its jurisdiction in the following cases, although the facts of each show more interrelation of operations, common management, common ownership, and financial control than exist here.

In *Consolidated Gas Company,* 107 NLRB 148, the Board said and held that:

> The employers are wholly owned subsidiaries of Consolidated Gas Company, located in Atlanta, Georgia, which is a holding company owning all of the stock in 5 corporations, including the 2 involved herein. All these corporations, separately incorporated and located in the State of Georgia, are engaged in the sale of bottled gas. During the past year, the parent holding company and its 5 subsidiaries received gas, equipment, and supplies valued in excess of $500,000 from sources outside the State of Georgia.

According to the employers' uncontradicted testimony, the parent holding company has a separate board of directors, with 1 holding company officer serving as officer of each of the 5 subsidiaries. The officers of the Savannah and Brunswick companies are the same. Although the general manager of the Savannah plant is also vice president of the Brunswick plant, the manager of the plant at Brunswick does not have reciprocal managerial duties at the Savannah plant.

Notwithstanding the interlocking directors among the parent company and the subsidiaries, all 5 corporations are conducted as separate enterprises, except that the holding company selects sources of supply for its subsidiaries and prepares, and allocates funds for, mutual advertising programs. Each subsidiary has a separate manager, offices, and books of account, and prepares separate tax returns of all kinds. Each handles its own selling activities. In addition, each corporation exercises full control over the employment conditions of its respective employees. There is no interchange of employees among the corporations. Wage rates and working conditions are set by the managers of the respective companies without regard for the personnel policies of the other subsidiaries. There is no showing that the parent holding company controls the labor relations policies of any of its subsidiaries.

Although the employers together with three other corporations are controlled by the same holding company, all the corporations operate independently and not as part of a single integrated enterprise with common operational and labor

relations policies. We find, therefore, that they are not a single employer within the meaning of the Act. Accordingly. we shall not consider the business of the three corporations not involved in this proceeding in determining whether to assert jurisdiction.

In *Goodman's Inc.*, 101 NLRB 352, the Board said and held in finding separate employers that:

> The employer is a wholly owned subsidiary of Baycull Trucking Company, Inc., a holding and real estate managing corporation owned by five families. This five-family group also owns a 90-percent interest in Goodman Warehouse Corporation. The Warehouse Corporation and Baycull each own a 50-percent interest in Goodman Furniture Company Goodman's, Inc., (the Employer), Goodman Furniture Company, and Goodman Warehouse Corporation occupy contiguous real estate owned by Baycull.
>
> Baycull's manager, Nathan L. Goodman, who is also vice president and a director of Baycull, is in addition the president and a director of each of the other three corporations. Two other director-officers of Baycull are the managers of the Employer and the Furniture Company, respectively. The fourth director-officer of Baycull is vice president and a director of the Warehouse Corporation. However, *none of these men participates in the day-to-day operations of more than one of the Goodman corporations.* (Emphasis supplied.)
>
> All four corporations are conducted as separate enterprises. Apart from the fact that the Employer

> rents all of its real estate from Baycull and that it utilizes the services of the Warehouse Corporation to an extent which constitutes less than 15 percent of the latter's revenue, the Employer does no business with or for any of the other corporations in the group. It has a separate manager, offices, and books of account, establishes separate credit ratings for its customers, and handles its own selling activities. There is no interchange of employees. Hours, wages, and conditions of work are different in each corporation. Labor relations policy is separately established by each of the several managers.

The Board has likewise refused to combine commerce data where the stock of several corporations was owned and controlled by the same individual or family. *Toledo Service Parking Company,* 96 NLRB 263, where there was not only common stock ownership but also "one general manager employed by all the corporations."

In *Clark Concrete Construction Corporation,* 116 NLRB 321, the Board held that three corporations engaged in manufacturing concrete products were not a single employer for jurisdictional purposes on the following facts:

> There are three Idaho corporations, each operating a plant located in that State, involved in this proceeding: (1) Clark Concrete Construction Corporation, operating a plant at Idaho Falls; (2) Idaho Concrete Products, Incorporated, operating a plant at Pocatello; and (3) Concrete Products,

Incorporated, operating a plant at Rupert. Merland Clark, his wife; Opal Clark, and Bill Holden, are, respectively, president and majority stockholder, secretary-treasurer, and a director of each corporation. The Idaho Falls plant, with approximately 47 employees, principally manufacturers cinder blocks and concrete products, including building blocks, sewer or culvert pipe, slabs, headgates, and prestressed beams. The Pocatello plant, with approximately eight employees, principally manufactures concrete pipe, headgates, and septic tanks. The Rupert plant, with approximately 12 employees, principally makes concrete headgates and farm irrigation pipe, some of which it also installs. The Idaho Falls plant sells blocks at wholesale to the other two plants, for resale to their customers. Each plant makes some retail sales. The Idaho Falls plant is about 50 miles from the Pocatello plant and about 120 miles from the Rupert plant, and the last two plants are about 72 miles apart.

President Clark maintains his office at the Idaho Falls plant, and such supervision as he exercises is confined to that plant, "practically all of the time". Generally, however, each plant is under the separate supervision of its own general manager, who hires and discharges employees, either directly or through his working foremen, and controls labor policy at his particular plant. There is little or no interchange of employees among the three plants. The general managers and Mr. Clark occasionally have business meetings together, generally in Idaho Falls, and occasionally one plant will rent equipment, such as manufacturing parts, to another, for which a charge is made.

Advertising is on a single-plant basis, except television advertising, which mentions, and is paid for by all three corporations. The office manager of the Idaho Falls plant audits the books of the other 2 corporations from once every month to once every 3 months. He may suggest better accounting methods or be consulted as to price changes, but has no supervision over office employees at the other plants. The Idaho Falls plant pays his salary and traveling expenses, the latter of which, however, are advanced to him by the other plants. Each plant has its own office and bookkeeper and keeps separate records and payrolls.

As noted above, the three corporations operating the plants have the same majority stockholder and common officers. However, in view of the different products manufactured at the 3 plants, their physical separation, the separate supervision and labor policies, the lack of employee interchange, and the separate record-keeping and payrolls, each of the 3 plants appears to be virtually autonomous. They are therefore not so integrated as to constitute the three corporations operating them a single employer for jurisdictional purposes.

In *Modern Linen & Laundry Service, Inc.*, 110 NLRB 1305, 1306, the Board refused to conglomerate purchases and sales for jurisdictional purposes of several corporations under common control on these facts:

Respondent, a Vermont corporation, is engaged in the laundry and dry cleaning business. It operates a plant in Rutland and three outlets at Rutland and Burlington, all in Vermont. The bulk of its business consists of wholesale linen and laundry

services to hospitals, hotels, restaurants, and similar institutions. In 1953 its total income amounted to $300,000, of which $30,000 was obtained from a linen supply route in northeastern New York State.

Louis Gordon is the sole stockholder of the Respondent corporation. Directors and officers are Louis Gordon, Murray Gordon, and Leo Silver. In addition, Louis Gordon, Murray Gordon, and their families own 4 linen supply companies in New York and 2 laundries in the same city. These individuals and their families also own three New York corporations, one of which makes uniforms for all the linen supply companies, including Respondent; another leases trucks to all linen supply companies, including the Respondent; and the third purchases supplies and equipment for all the companies, including Respondent.

Louis Gordon is the chief executive of all the companies including the Respondent. He and Murray Gordon act for all and sign all of the Respondent's checks. One individual acts as comptroller for all of the companies on a fee basis. However, there is no interchange of employees among the various companies, nor is there a uniform labor policy. Prices of services, delivery schedules of operation, wages, labor policy, as well as other aspects of the management of Respondent's business, are determined by the local plant manager at Rutland.

Here, each station manager operates his own corporation, he determines the number of employees, their

wages, hours and other conditions of employment (R. 144, 197, 296, 305, 327, 328, 339). No control is exercised over the manager in the day-to-day, week-to-week and month-to-month operations of WSIM (R. 304-5, 327).

The cases cited and quoted in this section conclusively show that WSIM is not sufficiently integrated with any of the other three separate and distinct operating corporations as to warrant the consideration of any two together in applying the Board's jurisdictional standards.

It is significant that only one employee is employed by WSIM in its engineering department. Under the National Labor Relations Act, the Board has no authority to certify a union as the collective bargaining representative of a one-man unit. *Luckenbach Steamship Co., Inc.*, 2 NLRB 181. Here, the assertion of jurisdiction by the Board is not only unwarranted on the commerce facts, but also would not effectuate the policies of the National Labor Relations Act, since the assertion of jurisdiction would not encourage "the practice and procedure of collective bargaining" between WSIM and the petitioner. 29 U.S.C. 151.

CONCLUSION.

The petition for a writ of certiorari should be denied. In the event that this Court should determine that the Supreme Court of Alabama applied federal law incorrectly, this cause should be remanded to the Su-

preme Court of Alabama to apply the Board's four criteria to the facts of this case, with directions to the Supreme Court of Alabama to ascertain whether the separate corporations should be considered as one employer for the purpose of the exercise of state jurisdiction pursuant to 29 U.S.C.A. 164(c).

Dated at Mobile, Alabama, this 11th day of September, 1964.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I, Willis C. Darby, Jr., hereby certify that I have mailed a copy of the foregoing Brief of Respondent In Reply To The Memorandum Of The United States, properly addressed to J. R. Goldthwaite, Jr., 1431 Candler Building, Atlanta, Georgia 30303 and to Pierre Pelham, First National Bank Building Annex, Mobile, Alabama, counsel for Petitioners, by depositing the same in a United States Post Office or mail box, with first class postage prepaid.

This the 11th day of September, 1964.

WILLIS C. DARBY, JR.,
Attorney for Respondent.